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IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* TIMBERLAND OWNERS AND MANAGERS SUPPORTING PETITIONER

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QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that an antitrust plaintiff alleging predatory *sales* must prove (among other things) that the defendant had a dangerous probability of later recouping its "investment" in—*i.e.*, the cost of—the allegedly predatory scheme.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must show (at least) that the defendant had a dangerous probability of recouping, through the exercise of market power, the costs of the allegedly predatory purchasing.

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BRIEF OF *AMICI CURIAE* TIMBERLAND OWNERS AND MANAGERS SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*

Amici are owners and managers of some of the largest private timberlands in the Nation.[1] The Campbell Group is a closely-held concern based in Portland, Oregon, which manages hundreds of thousands of acres of timberland owned by pension funds and endowments. The Campbell Group markets timber and logs from the Pacific Northwest and Southern United States both domestically and abroad.

Forest Systems, LLC is an employee-owned firm based in Massachusetts. It manages thousands of acres of timberland in the Pacific Northwest and Southern United States, providing forest and portfolio management services as well as forestland valuation services.

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[1] The parties have consented to the filing of this brief in writing. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Global Forest Partners LP is an employee-owned timber investment management firm based in New Hampshire. It manages over $1.5 billion in timber investments in the United States, South America, Australia, and New Zealand.

Hampton Resources, Inc., through its affiliates, owns, manages and operates timberlands and sawmills in Oregon and Washington. It processes conifer logs in its own mills, and sells hardwood logs to third parties.

Hancock Natural Resource Group, Inc. is a registered investment adviser based in Boston, Massachusetts. It develops and manages global timberland portfolios in North America, Brazil, Australia, and New Zealand.

Menasha Forest Products Corp. is a privately-held real estate investment trust based in North Bend, Oregon. It owns 150,000 acres of timberland in Oregon and Washington, and sells timber in domestic and export markets.

Plum Creek Timber Company, Inc. is a privately-held real estate investment trust based in Seattle, Washington. It owns over 8 million acres of timberland in the United States; it sells timber and logs; and it produces lumber, plywood, and medium-density fiberboard.

Resource Management Service, LLC is an independent, employee-owned manager of forest investments. Based in Birmingham, Alabama, it has bought, sold, and managed timberland in the Southern United States since 1950.

The Ninth Circuit's decision in this case holds that petitioner, a purchaser of alder sawlogs, may be held liable for treble damages under Section 2 of the Sherman Act, 15 U.S.C. § 2, for paying more than "necessary" for its inputs to deny competitors access to those inputs at a "fair" price. It held that such liability may be imposed, moreover, without showing that the purchaser could recoup the costs of the alleged overbuying through the exercise of market power later on. As timberland owners and managers that harvest timber and sell logs to companies like petitioner and respondent, *amici* have a profound interest in this case. By

establishing an unintelligible standard for antitrust liability (*i.e.*, imposing liability for paying more than a "fair" price or for buying more logs than "necessary"), the decision risks condemnation of legitimate competition among buyers. That chills price competition for the logs that *amici* sell. Because it restricts bidding competition for goods, the decision reduces the ability to expand supply—by bringing otherwise uneconomic sources to market—in times of high demand. It also prevents price competition from allocating resources to the highest-value users.

STATEMENT

1. Congress enacted the Sherman Anti-Trust Act, 15 U.S.C. § 1 *et seq.*, in 1890 to proscribe the unlawful acquisition and retention of market power. Section 1 prohibits contracts or combinations "in restraint of trade." *Id.* § 1. Section 2 addresses unilateral conduct and certain types of concerted conduct. It provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * * ."

Id. § 2. Antitrust laws provide a private, treble-damages remedy for those injured by violations of the Act. *Id.* § 15.

This Court has long interpreted Section 2 of the Sherman Act to prohibit unilateral conduct that is "predatory," *i.e.*, conduct that excludes competition on some basis other than efficiency, if it results in a monopoly or poses "a dangerous probability of actual monopolization." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 455 (1993). In the context of predatory pricing—where the defendant is accused of aggressively cutting prices to force competitors from the market—the Court has required proof that (1) "the prices complained of are below an appropriate measure" of the defendant's cost, and (2) the defendant had "a dangerous probability[] of recouping its investment in

below-cost prices." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993). This case concerns whether similar principles apply to allegedly exclusionary *purchasing* of inputs, *i.e.*, to cases where the defendant is accused of bidding up prices and purchasing large amounts of an input to deny competitors access to it.

2. Petitioner Weyerhaeuser and respondent Ross-Simmons Hardwood Lumber Co. operated competing sawmills in the Pacific Northwest. The predominant hardwood species in that area is red alder.[2] Although alder was once considered an undesirable "weed" tree, it now is a highly desirable hardwood that can be processed into lumber and made into cabinets, fine furniture, veneer, plywood, and paper products. (It is the only wood used for the famous Fender Stratocaster electric guitar.) Red alder can also be used for barbecuing and smoking meats.

At least three groups are involved in the production of alder products. Timberland owners and managers harvest timber and supply sawlogs. The *amici* participating in this brief fall into that category. They own and manage timberland; harvest timber; and supply logs. Sawmill owners and operators buy the logs and process them into finished lumber and other materials.[3] Petitioner Weyerhaeuser falls into this category, as did respondent before closing its facility in 2001. Finally, still others purchase finished hardwoods for use in consumer products. Pet. App. 2a-3a.

Respondent began operating an alder sawmill in Washington in 1962; petitioner entered the Pacific Northwest alder market in 1980. Pet. App. 3a. From 1996 to 2001, Weyerhaeuser purchased about 65% of the alder sawlogs marketed for processing in the Pacific Northwest. *Ibid.*

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[2] At the most general level, sawlogs and lumber are divided into two categories—"softwood" (*e.g.*, conifers such as white pine and douglas fir) and "hardwood" (*e.g.*, cherry, maple, walnut, and alder).

[3] Because alder logs are expensive to transport, alder sawmills usually operate within 100 miles of their timber sources. Pet. App. 2a-3a.

During that period, its share of North American hardwood lumber sales was less than 3%. Pet. 4; C.A. E.R. 405. Between 1998 and 2001, the price of alder sawlogs increased. Pet. App. 3a. Simultaneously, hardwood lumber prices dropped. *Ibid.* During that time, about 9 hardwood mills in the region, including respondent's, became unprofitable and closed. C.A. E.R. 443-444.

Respondent filed this suit against Weyerhaeuser in December of 2000, claiming that Weyerhaeuser violated Section 2 of the Sherman Act by attempting to monopolize the alder sawlog market in the Pacific Northwest. Respondent alleged, among other things, that Weyerhaeuser had engaged in "predatory overbidding" or "predatory purchasing." Pet. App. 3a. According to respondent, Weyerhaeuser had overpaid for, and overpurchased, alder sawlogs to drive up prices and reduce the supply available to competing sawmills. *Id.* at 3a-4a.

At the close of trial, the district court instructed the jury on respondent's theory of predatory purchasing as follows:

> One of [respondent's] contentions in this case is that [Weyerhaeuser] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anticompetitive act.

Pet. App. 7a n.6; C.A. E.R. 573.[4] The jury found for respondent, and the court awarded treble damages in the amount of $78,769,218. Pet. App. 4a.[5]

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[4] The jury was also instructed on respondent's claims that Weyerhaeuser had entered into restrictive purchasing agreements with sawlog suppliers, and had made misrepresentations to obtain sawlogs from state forests. See Pet. App. 4a; C.A. E.R. 50-53.

[5] The jury found against respondent on its claim that Weyerhaeuser had monopolized or attempted to monopolize the market for finished red alder lumber. It found there was no distinct market for *alder* lumber, presumably because alder and other hardwoods are interchangeable for most purposes. C.A. E.R. 581-582.

3. The Ninth Circuit affirmed. The Ninth Circuit first addressed whether predatory purchasing claims should be governed by standards similar to those that govern predatory pricing claims. Pet. App. 6a-13a. The Ninth Circuit explained that, under this Court's decision in *Brooke Group*, a plaintiff alleging predatory pricing—that the defendant aggressively *cut prices* to drive out competitors—must meet demanding standards. First, the plaintiff must show "the prices complained of are below an appropriate measure" of the defendant's cost. Pet. App. 7a. Second, the plaintiff must show that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." *Ibid.*

The Ninth Circuit held that plaintiffs alleging predatory *purchasing*—that the defendant aggressively *bid up the price of inputs* to drive out competitors—need not make analogous showings. It thus rejected Weyerhaeuser's claim that "overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of its recoupment of losses existed." Pet. App. 7a-8a. The Ninth Circuit recognized that "buy-side predatory bidding cases," like "sell-side predatory pricing cases," allege the use of price to impede competition. *Id.* at 8a-9a. But it declared that "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 9a. If there is predatory pricing, consumers benefit from aggressive price cuts. By contrast, aggressive bidding for inputs does not necessarily lower prices. The Ninth Circuit acknowledged that, if end-product prices decline during bidding predation, then consumers might benefit. But it asserted that such price declines would "place even greater pressure on competitors, increasing the threat to competition from the predatory bidding." *Id.* at 10a. The court continued (*ibid.*):

> Moreover, predatory bidding claims do not directly challenge a firm's decision to cut prices; instead, they focus on a firm's decision to raise the cost of inputs. Therefore, the concerns the *Brooke Group* Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory buying is at issue.

The Ninth Circuit also rejected the possibility that "rising input prices might encourage new companies to enter the supply side of the market" or otherwise "encourage innovation and efficiency so that consumers benefit in the long run." Pet. App. 11a. The Ninth Circuit declared that such a result was not likely here because alder sawlogs are "a natural resource of limited annual supply in a relatively inelastic market." *Ibid.* (The Ninth Circuit did not address whether declining margins between the price of sawlogs on the one hand, and the price of finished lumber on the other, would encourage sawmills to increase efficiency.) The Ninth Circuit therefore held that the "standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing." *Ibid.*

Accordingly, the Ninth Circuit ruled that the trial court "did not need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of * * * recoupment * * * existed," Pet. App. 14a, and likewise rejected Weyerhaeuser's challenge to the sufficiency of the evidence, *id.* at 17a. The Ninth Circuit did not address whether there was sufficient evidence to support liability under a theory other than predatory purchasing. *Ibid.*

SUMMARY OF ARGUMENT

A. This Court has long recognized the difficulty of distinguishing procompetitive unilateral conduct—aggressive competition—from anticompetitive predation. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588

(1986). To avoid erroneous condemnation of lawful competition, the Court has required that claims of "predatory" conduct brought under Section 2 of the Sherman Act be evaluated under objective standards. In general, plaintiffs must show that the challenged conduct is inconsistent with permissible competition. The inference of anticompetitive conduct, moreover, must make "economic sense." *Matsushita*, 475 U.S. at 587-593. With respect to allegations of "predatory pricing"—*i.e.*, that the defendant aggressively cut prices to drive out competition—the plaintiff must show, *inter alia*, that the defendant was dangerously likely to "recoup" forgone short-term profits by collecting supracompetitive, long-term profits after driving competitors from the market. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993).

B. Like claims of predatory pricing, claims of "predatory bidding"—such as in this case—"make[] no economic sense" absent a dangerous likelihood of recoupment. *Matsushita*, 475 U.S. at 587. The Ninth Circuit thought it appropriate to uphold a "predatory bidding" verdict without such proof because, in its view, false condemnation of aggressive bidding on the buy-side is less problematic than false condemnation of price-cutting on the sell-side. Not so. Aggressive bidding for inputs, no less than aggressive price cuts, is a feature of healthy competition. Unrestrained bidding for inputs, moreover, is necessary for proper operation of most markets, including timber markets. When bidding drives prices up, producers bring additional supplies on line. Supply in timber markets is very responsive to price. In addition, vigorous competition among bidders ensures that valuable resources are allocated to the bidder that values the resources most highly—generally, the bidder that will put the resources to their most efficient, intensive, and socially valuable use.

C. The Ninth Circuit's jury instructions toss a monkey-wrench into the operation of those mechanisms. Without a

recoupment requirement, standards such as "more than necessary" or "fair price" are incapable of separating competitive from anticompetitive conduct. Competitors subjected to such standards will have to think long and hard before bidding aggressively for inputs for fear of paying treble damages for having competed too well.

The instructions approved by the Ninth Circuit are especially problematic in the timber industry, where many procompetitive practices may easily be mistaken for overbidding or overbuying. For example, sawmills often establish a "cold deck," an inventory of logs stored to guard against seasonal disruptions of supply. Timber purchasers may also purposefully err in the direction of overpurchases to avoid allowing their large capital investments and labor forces to sit idle during periods of undersupply. The Ninth Circuit's jury instructions simply fail to offer any protection against false condemnation of such procompetitive conduct.

D. The Ninth Circuit suggested that false positives in the context of bidding competition are not problematic—and that proof of recoupment was therefore unnecessary here—because alder supply is relatively "inelastic." That is incorrect. First, requiring different jury instructions for different markets, depending on elasticity of supply (often a hotly contested issue) is unworkable in practice. Second, even in inelastic markets, price-competition among buyers plays a critical role in allocating goods to the most efficient, highest-value user—a role the Ninth Circuit wholly ignores and wholly undermines. Third, factually, the supply of timber and alder sawlogs to market is highly elastic, not inelastic. Fourth, drawing such distinctions offends this Court's practice of evaluating buy- and sell-side competition under equivalent standards.

ARGUMENT

The Ninth Circuit in this case upheld an antitrust verdict of more than $70 million based on jury instructions that lacked objective criteria. In particular, the court of appeals

held that a plaintiff can establish a claim of anticompetitive overbidding—and obtain treble damages—if the jury finds that the defendant purchased "more" of an input "than it needed or paid a higher price * * * than necessary" to prevent competitors from obtaining that input "at a fair price." Sellers like *amici* should not be restricted to selling—and potential purchasers should not be restricted to buying—at a price deemed "fair" by a jury after the fact. To the contrary, sales must be permitted at prices set by the competitive market, with potential liability determined under predictable legal standards.

Sometimes vigorous competition increases the price of an input, like alder sawlogs, as competing buyers aggressively bid for it. When that occurs, it signals producers to bring more supply to market to prevent shortages. That effect is particularly important in the timber industry, because the decision to put any particular stand of timber to market is highly price sensitive. In addition, competitive bidding ensures that inputs like red alder are allocated to the highest-value user, not misallocated to less efficient firms with lower-value uses. Finally, aggressive competition for inputs, no less than competition for sales, weeds out less efficient competitors.

The threat of antitrust liability under an essentially standardless standard, like that approved by the Ninth Circuit here, inappropriately disrupts that process. It chills purchasers from engaging in aggressive purchase-price competition that is critical to ensuring an efficient supply of inputs. And it produces economic inefficiency, effectively guaranteeing lower-value timber users access to timber that can be used more efficiently by others. Aggressive antitrust enforcement is critical to protecting competition. But that enforcement must occur under objective standards so that the laws designed to protect competition do not become the means of impeding it. In the context of predatory purchasing claims, particularly in this industry, a

clear instruction on the issue of recoupment is indispensable to ensuring that the antitrust laws do not punish the fierce competition those laws were intended to protect.

A. Proof Of Recoupment Is Essential To Any Economically Rational Predation Claim

On its face, procompetitive behavior (particularly unilateral action) is often indistinguishable from anticompetitive conduct. No less than would-be monopolists, fierce competitors in fully competitive markets seek to beat the competition. Because the means of "legitimate competition" and "the means of illicit exclusion" are both "myriad," *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)), this Court repeatedly has warned against the adoption of Section 2 standards that result in "false positives." "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct'"—the competition—"'the antitrust laws are designed to protect.' * * * The cost of false positives counsels against an undue expansion of § 2 liability." *Ibid.* (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

The difficulty of distinguishing vigorous competition from anticompetitive conduct arises with particular force where predatory pricing behavior is alleged. Typically, a "predatory pricing" claim involves the assertion that the defendant aggressively cut its prices to eliminate competition. But sellers also compete legitimately by cutting prices; that is the essence of price competition. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Confronted by the need to distinguish competitive from anticompetitive price cuts, this Court has strived for objective and administrable standards.

In *Matsushita*, for example, the Court addressed whether a plaintiff alleging predatory pricing had adduced sufficient proof to withstand a motion for summary judgment.

Noting "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful," 475 U.S. at 589, the Court explained that "courts should not permit factfinders to infer" such conduct "when such inferences are implausible * * * ," *id.* at 593. The Court declared that conduct "as consistent with permissible competition as with illegal [conduct] does not, standing alone, support an inference of antitrust [violations]." *Id.* at 588. Thus, plaintiffs must show conduct that is *inconsistent with* permissible competition. In addition, a plaintiff's allegations must be grounded in economic reality: If the claim is "implausible—if the claim is one that simply makes no economic sense—[the plaintiff] must come forward with more persuasive evidence * * * than would otherwise be necessary." *Id.* at 587.

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court again applied *Matsushita*'s requirements to allegations of predatory selling. The Court observed that price cuts that merely reflect one competitor's "lower cost structure" are the essence of "competition on the merits." *Id.* at 223 (quoting *Atlantic Richfield*, 495 U.S. at 340). "[S]tandards for predatory pricing liability" must not be "so low that antitrust suits themselves bec[o]me a tool for keeping prices high." *Id.* at 226-227. The Court therefore held that plaintiffs must show pricing behavior that is inconsistent with legitimate competition by proving "that the prices complained of are below an appropriate measure of [the defendant's] costs." *Id.* at 222.[6]

The Court also reiterated *Matsushita*'s requirement that allegations of anticompetitive conduct must be economically "plausible." *Brooke Group*, 509 U.S. at 224 (citing *Matsushita*, 475 U.S. at 589). Because aggressive price-cutting

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[6] Analogously, in *Trinko*, 540 U.S. at 409-410, this Court refused to impose liability for failure to cooperate with rivals absent proof that, in so doing, the defendant terminated a previously profitable relationship or otherwise refused full compensation at its profitable retail rates.

forces the alleged predator to endure losses in the short term, predatory pricing is plausible only if the losses are treated as "an investment." And "[f]or the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." 509 U.S. at 224. A finding of likely recoupment is thus a *sine qua non* for any predatory pricing claim: Recoupment "is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation." *Ibid.*

But recoupment is far from assured:

> For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals[, such as] driving them from the market * * * .

Brooke Group, 509 U.S. at 225 (citing 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 720c (1978)). In addition, even if competitors are driven from the market, the success of any predatory scheme depends upon *maintaining* monopoly power long enough both "to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 590; K. Elzinga & D. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard In* Brooke Group, 62 Antitrust L. J. 559, 583 (1994). Simply put, when deciding whether a predation claim "makes * * * economic sense," 475 U.S. at 587—and ensuring that the antitrust laws do not punish the procompetitive conduct they were intended to protect—recoupment is an indispensable criterion.[7]

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[7] One court has questioned whether *Brooke Group* applies where the defendant is accused of adopting a price structure that—by linking discounts to the purchase of a range of products—is tantamount to an exclusive dealing arrangement. *LePage's Inc.* v. *3M*, 324 F.3d 141, 154-163 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 953 (2004). No such arrangement is alleged here. This case involves a straightforward "predatory bidding" claim. *LePage's*, moreover, did not address the necessity of proving recoupment.

B. Recoupment Is Likewise Necessary For Predatory Purchasing Claims

This case, of course, involves a claim of predatory purchasing on the "buy side" rather than predatory pricing on the "sell side." Thus, respondent does not allege that Weyerhaeuser cut prices for its output. It alleges that Weyerhaeuser bid up prices for inputs. In particular, respondent claims that Weyerhaeuser overbought and overpaid for alder sawlogs to prevent competitors from obtaining them at an affordable price. See Pet. App. 3a-4a; see generally R. Blair & J. Harrison, *Monopsony* 66 (1993). As in the context of predatory pricing, however, it can be very difficult to distinguish between legitimate bidding behavior and predatory purchasing. As in the context of predatory pricing, moreover, the effects of any rule that results in "false positives" and unwarranted liability would be profoundly negative. Consequently, as in the context of predatory pricing, the need for jurors and courts to be guided by objective criteria—such as the requirement that there be a dangerous likelihood of recoupment—is inexorable.

1. No less than aggressive price cuts, aggressive bidding is typical of competitive behavior. The "competitive instinct" of *all* buyers competing for valuable resources is "to bid up price." *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 925 (1st Cir. 1984) (Breyer, J.). Adam Smith recognized as much at the time of this Nation's founding. See A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book One, ch. VII (Modern Library ed. 1994) (1776) (where demand for a commodity outpaces supply, "[a] competition will immediately begin among [buyers], and the market price will rise" in accordance with "the eagerness of the competition"). As a result, the "difficulty of distinguishing an anticompetitive overbuying strategy from a competitive purchase expansion can be similar to the difficulties in predatory pricing matters." Pet. App. 9a n.14 (quoting S. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669, 702 (2005)). Often, "it may

be difficult for a court to know whether the firm is attempting to predate or simply competing in the input market with rivals who are also purchasing the inputs." *Ibid.*

2. Moreover, "erroneous inferences and the resulting false condemnations" are no less "costly" in predatory purchasing cases than in predatory pricing cases. *Trinko*, 540 U.S. at 414. In both contexts, too lenient a standard threatens to "chill the very conduct the antitrust laws are designed to protect." *Ibid.*

a. As this Court has observed, "[p]rice is the central nervous system of the economy." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978) (quotation marks omitted). That is no less true when prices *rise* because of competition among buyers than it is when prices decline because of competition among sellers. In competitive markets, increasing prices signal suppliers to increase their output to meet increased demand. In the timber industry, for example, timber from certain lands (*e.g.*, remote areas, or those with difficult terrain) is more costly to extract. That timber will not be brought to market at lower price levels. If demand increases and purchasers begin paying higher prices, however, suppliers can and will put higher-cost timberlands into profitable service. Economists have long recognized that the supply of timber is highly price-sensitive.[8] Indeed, like private sellers, the

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[8] See, *e.g.*, I. Gomez, *et al.*, *Alternative Price Expectations Regimes in Timber Markets*, 5 J. Forest Econ. 235 (1999) ("Price expectations play a critical role in timber markets. Each period, producers must decide whether to harvest or hold their timber."); R. Yin & D. Newman, *A Timber Producer's Entry, Exit, Mothballing, and Reactivation Decisions Under Market Risk*, 5 J. Forest Econ. 305, 306 (1999); *id.* at 317 ("Due to harvest flexibility and relatively low costs associated with temporary suspension of production, mothballing [*i.e.*, temporary suspension of production] enters the producer's choice set as a critical marketing decision."); J. Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 S. Forest Econ. Workshop 26 (1999) ("Timber supply responds to market signals through the myriad private and public decisions to harvest a portion of

United States relies on market forces to allocate its timber resources. When harvesting rights are set for auction, bidding must exceed an appraised-value reserve price. 16 U.S.C. § 472a(a), (e)(1)(B). The government's timber thus is not put to market unless prices exceed a certain threshold.

A rule that too lightly imposes liability—much less treble damages liability—throws a monkey-wrench into that market mechanism. Confronted by the threat of liability for paying what a jury deems more than a "fair" price, purchasers would have to think long and hard before competing aggressively for inputs on price. Denied the price stimulus to put additional or more costly resources into service, suppliers would not be able to alleviate shortages. If producers "are forced to accept less than the competitive price for their product, * * * the result will be that individual [producers] will either produce less or stop producing at all. [Input buyers] will purchase fewer [inputs] and * * * will also produce less [of their finished product]." 12 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 2011b1, at 128-129 (2d ed. 2002). That injures consumers and producers alike.

b. In addition, price competition among buyers is critical to ensuring that inputs and resources are directed to their most productive use. In a competitive market, the party willing to pay the most for an input generally is the one that will put it to its most valuable use, employing it most efficiently and intensively. See P. Areeda & L. Kaplow, *Antitrust Analysis* 7-8 (5th ed. 1997). "It is an uncontroversial proposition of economics that the highest

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timber inventories. The aggregate response to price is, therefore, a function of biology, the environment, the characteristics of the inventory, and the objectives of the harvest decision makers."), *available at* http://www.srs.fs.usda.gov/econ/pubs/misc/jpp992.pdf; D. Wear & P. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199, 211 (1999) ("Supply in the short and medium runs may be highly variable in response to market fluctuations * * * ."). See also pp. 28-29, *infra* (responding to the claim that alder timber is different).

bidder in an auction is likely to be the most efficient user of the assets being sold." J. Coffee, Jr., *Regulating the Market for Corporate Control*, 84 Colum. L. Rev. 1145, 1151 n.11 (1984).[9] Simply put, those who plan to put an input to a lower-value use, or who will make less efficient use of it, ordinarily will not pay as much for it. Conversely, more efficient competitors who will put the input to higher-value use are generally willing to pay more.

For that reason, the United States has adopted a policy of allocating some scarce public resources to the highest bidder. The FCC has concluded that "competitive bidding" ensures that electromagnetic (radio) spectrum is made "available to those who value it most highly and therefore are most likely to put it to its most economically efficient use." 62 Fed. Reg. 9636, 9640-9641 (Mar. 3, 1997); see E. Kwerel & W. Strack, FCC, *Auctioning Spectrum Rights* 2 (Feb. 20, 2001) (assigning licenses to high bidders allocates them to "the parties that value them most highly," *i.e.*, those who are "generally best able to provide consumers with the services they most want, while using the spectrum most efficiently."). For similar reasons, the Justice Department has supported competitive bidding to allocate capacity at La Guardia Airport in New York. See Comments of the U.S. Department of Justice, Docket No. FAA-2001-9854, at

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[9] "Allocating resources among competing claimants by price is desirable because it places resources with the most efficient users." R. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 Stan. L. Rev. 819, 872 (1981). See also F. Easterbrook & D. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1176 n.40 (1981) ("[T]he best indication of the ability to put something to a valuable use is the willingness to pay for it."); W. Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 J. of Fin. 8, 14 (1961); R. Marshall & M. Meurer, *Bidder Collusion and Antitrust Law: Refining the Analysis of Price-Fixing to Account for the Special Features of Auction Markets*, 72 Antitrust L. J. 83, 111 (2004) (Because "the bidder with the highest valuation always wins," allocation by price "achieves greater allocative efficiency.").

1 (June 20, 2002) (explaining that "[m]arket-based mechanisms (like * * * a recurring auction market for slots)" help ensure that inputs are put "to their highest valued use").

Timber is no different. As in other contexts, bidding competition allocates alder sawlogs to the competitors that will put the logs to their highest and most socially valuable use. Consistent with that, the United States—as in other contexts—relies on the allocative efficiency of the auction process when distributing the right to harvest timber on federal land. 16 U.S.C. § 472a(a), (e)(1)(B); pp. 15-16, *supra*.

Imposing liability haphazardly mutes that price competition among buyers and prevents efficient allocation. Under such a regime, the most efficient and best user of sawlogs (or any other input) could not aggressively outbid others, for fear that it will confront treble-damages liability for paying more than "necessary." With competition thus dampened, valuable resources would be allocated to less-efficient competitors, with less valuable uses, by default. When that occurs, efficiency suffers and consumers pay the price.

c. Because of those concerns—to avoid dampening competition among buyers—predatory purchasing claims, like predatory pricing claims, must be governed by an objective standard capable of precluding false positives. As in the context of predatory pricing, that requires a factual finding that the defendant had a dangerous probability of "recouping" the expense of the allegedly predatory scheme through the exercise of market power later on. "[P]roof of recoupment seems essential in all cases of predatory spending." H. Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Pol'y Int'l 21, 38 (2006). Absent a significant likelihood of recoupment, an alleged predatory purchasing scheme "makes no economic sense." *Matsushita*, 475 U.S. at 587. Merely overpaying for a good "ordinarily is not cost justified unless it leads to a future payoff." *Monopsony*, *supra*, at 66; Pet. App. 10a ("In the long run, to carry out a predatory bidding scheme suc-

cessfully, a firm would have to recoup the higher costs it had paid for its materials"). Thus, even assuming that "overpayment" in some sense can be proven, allegations of predatory conduct should not be given credence absent proof that recoupment is likely.

C. The Jury Instructions Here Were Insufficient To Prevent Condemnation Of Procompetitive Conduct In Timber Markets

Notwithstanding *Matsushita* and *Brooke Group*, the Ninth Circuit endorsed a jury instruction that omitted any requirement that respondent prove a dangerous probability of recoupment. See 4/17/2003 Tr. 7, 11 (deleting requirement). Instead, the Ninth Circuit allowed the jury to condemn bidding behavior based on the subjective conclusion that the defendant paid "a higher price than necessary" in order to prevent others from obtaining inputs "at a fair price":

> One of [respondent's] contentions in this case is that [Weyerhaeuser] purchased *more logs than it needed*, or paid *a higher price for logs than necessary*, in order to prevent [respondent] from obtaining the logs [it] needed at a *fair price*. If you find this to be true, you may regard it as an anti-competitive act.

Pet. App. 7a n.8; C.A. E.R. 573 (emphasis added). As the Ninth Circuit summarized, the trial court "instructed the jury that, if it found that Weyerhaeuser paid higher prices than necessary for sawlogs, the jury could regard that as an anticompetitive act." Pet. App. 4a.

1. Those sorts of standards—"a higher price than necessary," "more logs than it needed," and "a fair price"—are wholly incapable of reliably separating anticompetitive conduct from procompetitive conduct. This Court has "held in the Sherman Act § 2 context that it [is] not enough to inquire whether the defendant has engaged in 'unfair' or 'predatory' tactics." 509 U.S. at 224-225 (quoting *Spectrum*

Sports, Inc. v. *McQuillan*, 506 U.S. 447, 459 (1993)). Yet that is effectively what the jury instruction did here.

Such an instruction is particularly problematic in this context. Ordinary, competitive business practices in the timber industry can easily be misinterpreted as nefarious. For example, the standard of "more logs than * * * needed" is difficult to apply in a meaningful fashion given that alder sawlog purchasers will, for procompetitive reasons, buy more timber than might seem needed to meet immediate production goals. Purchasers often make excess purchases seasonally to establish what is known as a "cold deck."[10] The large, fixed, capital investments involved in sawmill operations make operators prone to err in favor of over-purchases rather than underpurchases, because the latter might idle expensive plants and employees,[11] or threaten the development of a nascent customer base.[12] Purchasers may "overpurchase" to hedge against future price increases[13]; and restart costs might make it sensible to

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[10] The "cold deck" is an inventory of "logs stored for future removal." 29 C.F.R. § 1910.265. Purchasers establish a "cold deck" because, during certain seasons, freshly harvested timber may become unavailable.

[11] Timber processing requires intense fixed capital investments, as well as a large labor force whose compensation includes not merely variable costs (*i.e.*, wages) but also relatively fixed costs (*i.e.*, benefits programs). If a sawmill goes idle, then the capital and human resources employed by the firm go unused. By stockpiling, the purchaser can "smooth" variations in timber supply and keep some capital and a fixed labor force working at a regular and productive pace.

[12] A purchaser may be particularly averse to the risk of losing supply if its customers are just becoming accustomed to using the purchaser's product—*e.g.*, a purchaser of alder sawlogs may fear that customers will switch to a substitute hardwood/hardwood supplier and never switch back. If that purchaser's risk-benefit calculus differs from its competitors, it may amass a relatively greater inventory.

[13] As in other contexts, a firm anticipating future price increases may "hedge" by securing supply in the present. S. Salop, *supra*, 72 Antitrust L. J. at 683.

operate at a loss for certain periods.[14] All of that, unfamiliar to jurors, easily can be mischaracterized by plaintiffs' counsel as nefarious efforts to drive out competition.

The notion of depriving competitors of goods at a "fair" price is likewise problematic. In market economies, prices must be set by supply and demand, not by a jury's subjective concept of "fairness." Juries may believe that it is "unfair" that gasoline now costs $3 per gallon. But when driven by the legitimate economic forces of supply and demand, such a price—high as it may seem—is lawful. And, in the timber industry, prices often exceed the fair price set by professional appraisers. When the United States sells its timber resources, it sets an appraised-value reserve price—the appraiser's estimate of fair price—below which the United States will not sell. 16 U.S.C. § 472a(a), (e)(1)(B). Although the government establishes a "fair" or appraised value as a floor, bidding regularly exceeds that amount. Under the Ninth Circuit's theory, that bidding—because it exceeds the governmentally established fair price—is a potential antitrust violation.

2. There is, moreover, substantial reason to believe that a jury, properly instructed on the issue of recoupment, would have concluded that Weyerhaeuser's aggressive competition for alder sawlogs was anything but anticompetitive. A rational predatory purchaser must recoup its losses—its "investment" in the scheme—in one of two ways: (1) by exercising power to raise prices in the market for the goods it sells (monopoly power), or (2) by exercising power to lower prices in the market for the inputs it buys (monopsony power). See *Monopsony, supra*, at 66.

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[14] Assembling an effective labor force for the plant can be very costly. Because of that, sawmills may choose to operate at a loss and retain their employees even if, in the short term, dismissing their employees and shuttering the plant would save money. In other words, sawmills will endure short-term operating losses to avoid the larger costs they would incur in reassembling their labor force and restarting the plant when economic conditions change.

Plaintiffs could not prove that Weyerhaeuser was likely to obtain monopoly power as a seller of finished alder lumber. Weyerhaeuser's market share for hardwood lumber sales in North America was less than 3% during the relevant period. Pet. 4; C.A. E.R. 405. With that small market share, Weyerhaeuser could not unilaterally sustain a price increase, much less one sufficient to allow it to recoup losses incurred in a predatory scheme.[15]

There is equal reason to doubt that a properly instructed jury would have found that Weyerhaeuser could recoup forgone profits by exercising monopsony power as a buyer of alder sawlogs.[16] As the *sellers* of alder sawlogs, *amici* are particularly sensitive to the risk of a purchaser exercising "monopsony" power to *depress* timber prices. *Amici* agree that it is unlawful for a purchaser to obtain such power by anticompetitive means. After all, "monopsony pricing

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[15] The jury found against respondent on its claim that Weyerhaeuser monopolized or attempted to monopolize the market for finished red alder lumber. It found that there was no distinct market for *alder* lumber, presumably because alder lumber and lumber made from other hardwoods are generally interchangeable. C.A. E.R. 581-582.

[16] Indeed, in another action with similar claims of anticompetitive conduct, the trial court instructed the jury that, for the year 2002, bidding could be anticompetitive only if, "at the time [Weyerhaeuser] acted, it had a reasonable expectation that it could recoup any losses sustained through this conduct, by paying lower log prices in the future due to a reduction in competition from other sawmills." *Washington Alder LLC* v. *Weyerhaeuser*, Civ. No. 03-753-PA, Jury Instructions at 11 (May 18, 2004). For the period covered by that instruction, the jury found *no* liability. See Verdict at 2, *Washington Alder*, *supra* (May 20, 2004). The jury imposed liability for the period from June 1999 to December 2001. For that time period, however, the court instructed the jury that it must consider two elements—that Weyerhaeuser had "monopoly power" and that it had willfully acquired or maintained that power "through anticompetitive conduct"—proved because of the issue-preclusive effect of the verdict in this case. Jury Instructions, *supra*, at 5 (directing that, because "the prior jury verdict addressed" those issues for "the period June 1999 through December 2001," the jury "must consider those elements to have been proven.").

* * * is analytically the same as monopoly or cartel pricing[, and is] so treated by the law." *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1360-1361 (7th Cir. 1996) (Posner, J.), rev'd on other grounds, 522 U.S. 3 (1997); see *United Airlines, Inc.* v. *U.S. Bank N.A.*, 406 F.3d 918, 925 (7th Cir. 2005) (Easterbrook, J.) ("United fancies the position of monopsonist, which the antitrust laws forbid on equal terms with monopoly.").

But any claim that Weyerhaeuser could recoup losses by forcing alder sawlog prices down is wholly counterfactual. Despite respondent's departure from the market, alder sawlog prices have continued to increase. According to *Log Lines*—an industry reporting service—prices for high-quality (#2) alder sawlogs rose during the alleged predation period just North of respondent's operations from $458 per thousand board feet in June 1998 and $502 in June 1999, to $543 in June of 2000 and $526 in June of 2001. After that, prices continued to rise—to $535 in June 2002, $580 in June 2003, to $619 in June 2004, to $658 in June 2005, to $667 in June 2006. See Appendix A, *infra* (graph). Other services report similar results in Oregon. See Appendix B, *infra* (graph). Those results reflect the trend in alder sawlog prices throughout the Pacific Northwest. Such price increases demonstrate that Weyerhaeuser has not recouped previously forgone profits. To the contrary, they show that, if Weyerhaeuser purchased aggressively *as a hedge* against rising prices, its strategy was procompetitive. By buying alder sawlogs earlier and more cheaply, Weyerhaeuser reduced its costs of production.[17]

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[17] Nor is it plausible that current prices are being influenced by a continuing strategy of predatory purchasing. A longer predation period makes recoupment even less likely, because one must consider the time-value of money. For a predatory scheme spanning 10 years to be profitable, the alleged predator must recover both the sum it "invested" in the scheme *and* the interest it could have earned on that sum by investing it elsewhere during the intervening 10 years. *Brooke Group*, 509

In deciding recoupment, the jury would also have to consider new entry into the sawmill business. "[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita*, 475 U.S. at 591 n.15 (quoting F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26-27 (1984)). If the high price of sawlogs drove competing sawmills out, low prices should draw them back in. The Ninth Circuit suggested that the capital intensive nature of the sawmill business creates a barrier to entry. Pet. App. 24a-25a. But it ignored the fact that—under respondent's own theory—increased prices had just driven a number of participants from the market. Those participants (or their successors) presumably could re-enter the market by restarting their idled mills without incurring the full up-front costs that would confront entrants building sawmills from scratch. The claim of barriers to entry is likewise counterfactual. During and after the alleged predation period, new facilities opened, while others expanded their operations.[18]

Recoupment efforts would also have to overcome the possibility of new entry through vertical integration. "[T]he option of vertical integration places competitive pressure on the firm's suppliers and buyers, who know that if they charge too much * * * the firm may decide to perform [that function] itself." *Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984) (Posner, J.).[19]

U.S. at 225-226 (recoupment must consider "the time value of [the] money invested in" predation); 3 Areeda & Hovenkamp, *supra*, ¶ 725a.

[18] Cascade Hardwoods expanded capacity in the late 1990s and 2000; Westwood began new operations in 1998 and expanded operations in 2003; Washington Alder began operations in 1999; Diamond West opened a new mill in 2002; Willappa Bay Hardwoods began operations in 2002; and Port Angeles Hardwoods opened a new mill in 2004.

[19] "[F]irms routinely decide whether to 'make or buy.' When a firm saves resources by doing for itself, something worthwhile has been accomplished." J. McGee & L. Bassett, *Vertical Integration Revisited*,

Indeed, "vertical integration is particularly common in raw-materials-based industries," including "forest products." R. D'aveni & A. Ilinitch, *Complex Patterns Of Vertical Integration In The Forest Products Industry*, 35 Acad. of Mgmt. J. 596, 596 (1992); see B. Murray, *Oligopsony, Vertical Integration, and Output Substitution: Welfare Effects in U.S. Pulpwood Markets*, 71 Land Econ. 193, 193 (1995). Two *amici* (Hampton Resources and Plum Creek) are already vertically integrated, since they manage forest lands, harvest timber, and operate sawmills. Any theory of recoupment would have to address the possibility of their expansion into alder sawmills.

Here, Weyerhaeuser competed vigorously for alder sawlogs. But the antitrust laws should protect, not punish, such competition. As a result, it was critical for the jury to receive guidance that would assist it in deciding whether Weyerhaeuser had crossed the line from competition into monopolization. The instructions here failed to do that. Because they omitted any requirement that the jury find recoupment was likely, they permitted liability under an antitrust theory that makes no economic sense.[20]

D. The Ninth Circuit's Reasons For Rejecting A Recoupment Instruction Are Inconsistent With Timber Economics

The Ninth Circuit's rationale for refusing a recoupment instruction here defies standard economic analysis. It is unsustainable on the facts of this case. And it is incorrect as a matter of law.

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19 J. L. & Econ. 17, 18 (1976); see generally R. Coase, *The Nature of the Firm*, 4 Economica (n.s.) 386, 390-91 (1937).

[20] For that reason, respondent's effort to rely on evidence of subjective intent fails. Unless the jury finds, on proper evidence, that the defendant was likely to recoup its losses, the claim of predatory conduct cannot succeed notwithstanding evidence that the defendant *intended* to engage in predatory conduct. *Brooke Group*, 509 U.S. at 232.

1. *The Ninth Circuit's Economic Analysis Of Timber Markets Was Faulty*

The Ninth Circuit did not deny that an antitrust rule that produces "false positives" would impede competition. Nonetheless, it held that predatory purchasing should be governed by a different rule than predatory sales because predatory purchasing does not necessarily lower consumer prices in the short term. "[P]redatory bidding claims," the Ninth Circuit declared, "do not directly challenge a firm's decision to cut prices; instead, they focus on a firm's decision to raise the cost of inputs. Therefore, the concerns the *Brooke Group* Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory buying is at issue." Pet. App. 10a.

At bottom, the Ninth Circuit seems to have ruled that competitive bidding among purchasers is less important because it does not enhance consumer welfare. For the reasons given above, see pp. 15-18, *supra*, that is incorrect. Price competition among purchasers is critical: It ordinarily allocates inputs to those buyers who, because they are the most efficient and intensive users, value the inputs most highly. And higher prices resulting from competition for inputs signals producers to increase supply and thereby alleviate shortages. By muting price competition for inputs, the Ninth Circuit's decision interferes with both mechanisms. It allocates scarce resources to *less* efficient users who, because they value the resources less highly, are unwilling to pay as much for them. And it prevents the sorts of price increases that, in properly functioning markets, signal sellers to bring additional inputs to market. If "[p]rice is the 'central nervous system' of the economy," *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692, the Ninth Circuit's approach is the antitrust equivalent of nerve gas.

Less efficient competitors (in this case, competing sawmills) undoubtedly would prefer not to confront pressure to enhance efficiency in the face of price competition for

supplies.[21] But that pressure, and the potential for the demise of the less-efficient, is the "creative destruction" necessary for the market to function. That process *is* the "essential fact about capitalism." J. Schumpeter, *Capitalism, Socialism, and Democracy* 83 (3d ed. 1950). The Ninth Circuit's decision unnecessarily intrudes into that process by protecting inefficient firms from their own shortcomings—or rewarding them for failure with treble damages—while condemning more efficient ones for competing effectively as buyers.

2. *The Ninth Circuit's Elasticity-Based Rationale Is Unfounded*

The Ninth Circuit also urged that the adverse impacts on bidding competition in this particular market—the market for alder sawlogs—are relatively unimportant. Increasing prices from bidding competition, that court stated, would not increase supplies because (in the Ninth Circuit's view) the supply of alder sawlogs is inelastic, *i.e.*, the supply does not readily increase in response to increased price. Pet. App. 11a. That analysis is triply flawed.

First, setting aside for the moment factual questions about whether alder supply is price-inelastic, pp. 28-29, *infra*, it is hard to see why the relevant antitrust *rule* should depend on the elasticity of supply. With respect to *sales* competition, *Brooke Group* did not announce different rules depending on the elasticity of *demand*. And any such approach would be unworkable. To select the proper jury instructions, a trial court would have to determine whether supply is elastic or inelastic. Markets, however, are rarely perfectly elastic or inelastic. The Ninth Circuit did not explain where, in the broad range between hypothetical perfect

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[21] Cf. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) ("[C]omplaints about price cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals. Such complaints * * * do not indicate illegal concerted action.") (quotation marks omitted).

elasticity and perfect inelasticity, it would be appropriate to adopt instructions that are more protective of buy-side bidding competition. Moreover, it makes little sense to fashion national antitrust rules based on claimed peculiarities in particular markets.[22]

Second, the Ninth Circuit ignored the impact of its ruling on price as an efficient allocation mechanism. As explained above, see pp. 16-18, *supra*, allowing bidders to compete aggressively for inputs results in allocative efficiency—it ensures that resources are directed to the highest-value user. That is just as true (and perhaps particularly important) for highly inelastic resources, such as radio spectrum and landing spots at airports. See pp. 17-18, *supra*. By deterring full price competition for inputs—threatening treble damages liability for competing too aggressively—the Ninth Circuit's approach irrevocably damages price as an efficient allocator.

Third, the Ninth Circuit's assessment of the price-elasticity of supply is incorrect. As explained above, timber supply is highly "elastic," *i.e.*, it is very responsive to price. When private timberland managers decide whether to harvest a particular parcel, they decide on the basis of price. When the government determines whether to sell its timber, its decisions turn on price. Economists agree that, in the short and medium term, the volume of timber brought to market is price-elastic. See pp. 15-16 & n.8, *supra*.

For the contrary proposition, the Ninth Circuit cited only a law review article asserting that *alder* in the Pacific Northwest is different because it typically is found in stands intermixed with other species (generally softwoods). The author therefore speculates that the decision to harvest tim-

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[22] That is not to say that elasticity is irrelevant. Recoupment is more likely to occur where supply is price-inelastic. But whether to require proof of recoupment must be decided as a general matter. A test that demands such proof in some cases (high elasticity) and not others (low elasticity) is unworkable in practice.

ber from a particular parcel depends more on the price of softwoods than on the price of alder. In *amici*'s experience, that is incorrect. The decision to harvest a particular parcel depends on the manager's expectation of how much it will receive for *all* the timber in that parcel. As a result, higher alder prices increase the likelihood that a stand containing alder will be harvested. Moreover, increased prices for alder affects decisions regarding *which* stands of timber to harvest. Relatively higher alder prices increase the incentive to bring tracts with higher concentrations of alder to market. By muting bidding competition for alder, the Ninth Circuit's rule prevents timberland managers from efficiently selecting the stands that should be brought to market to meet current demand.

3. *The Ninth Circuit's Dismissal Of Buy-Side Competition Contravenes Precedent.*

Just like economic theory, this Court's precedents recognize that price competition has value on both sides of the transaction. It may be that would-be *sellers* compete for sales by countering each other with *lower prices*, while would-be *buyers* compete for inputs by countering each other with *higher offers*. But neither side of the competition "coin" is devalued by the Sherman Act. To the contrary, this Court's cases repeatedly acknowledge the importance of protecting buy-side competition.

In *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 221-223 (1948), for example, sugar beet growers alleged that refiners—purchasers—had conspired in violation of Sherman Act Section 1 to depress the prices paid to growers. The Court rejected the notion that bidding competition is less important than sales competition:

> It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specifically injured under the treble damage claim are sellers, not customers or consumers. * * * The

> statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.

Id. at 235-236 (footnotes and citations omitted).

Likewise, in *American Tobacco Corp.* v. *United States*, 328 U.S. 781 (1946)—a Section 2 case—the Court declined to distinguish between buyer and seller competition. That case concerned the claim that tobacco companies had conspired to monopolize both on the sell-side ("to fix prices * * * in the * * * sale of their principal products") and on the buy side (by bidding up the price of cut-rate tobacco "to such a point that cigarettes made therefrom could not be sold at a sufficiently low price to compete with the [defendants'] more highly advertised brands"). *Id.* at 803-804. The Court did not evaluate buy- and sell-side conduct under different rubrics. Rather, it considered all of the allegations under the same standards. *Id.* at 808-815

The protection of buy-side competition is no less imperative in the timber industry. Indeed, the government prosecutes bidders who collude no less than sellers who collude. See *United States.* v. *Champion Int'l Corp.*, 1975-2 Trade Cases ¶ 60,453, 67,040 (D. Or. 1975) ("The bidders, of course, were delighted with this [collusive] bidding pattern because, being without opposition, they were able to purchase the timber at or near the appraised value."), aff'd, 557 F.2d 1270 (9th Cir. 1977). The Ninth Circuit's disregard for ensuring that antitrust rules do not mute price competition among timber buyers cannot be reconciled with the government's use of criminal prosecutions to protect that competition. Simply put, Section 2 of the Sherman Act draws no distinction between the importance of buy-side and sell-side competition. Nor should this Court when establishing the standards to govern this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the court of appeals be reversed.

Respectfully submitted.

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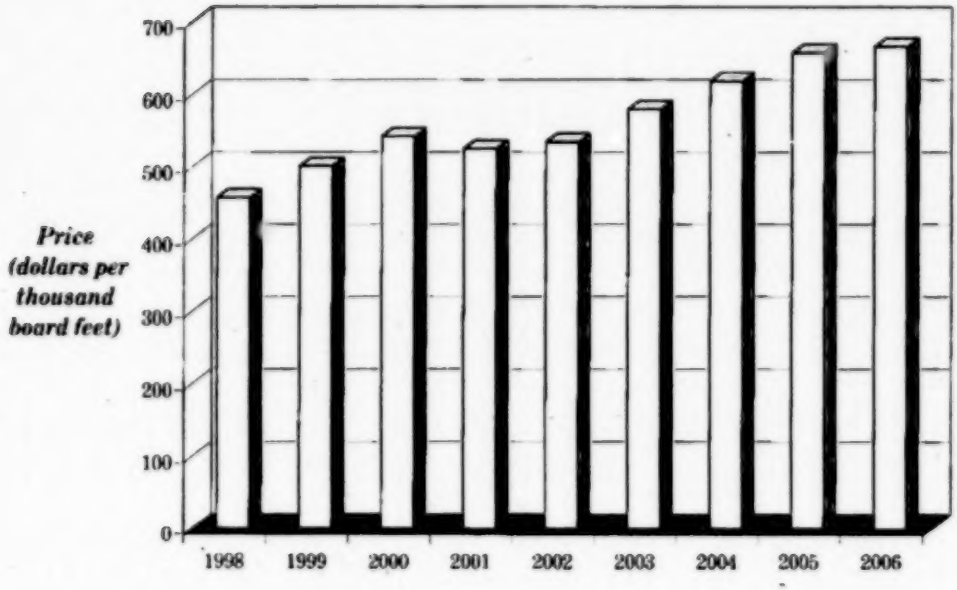
APPENDIX

APPENDIX A

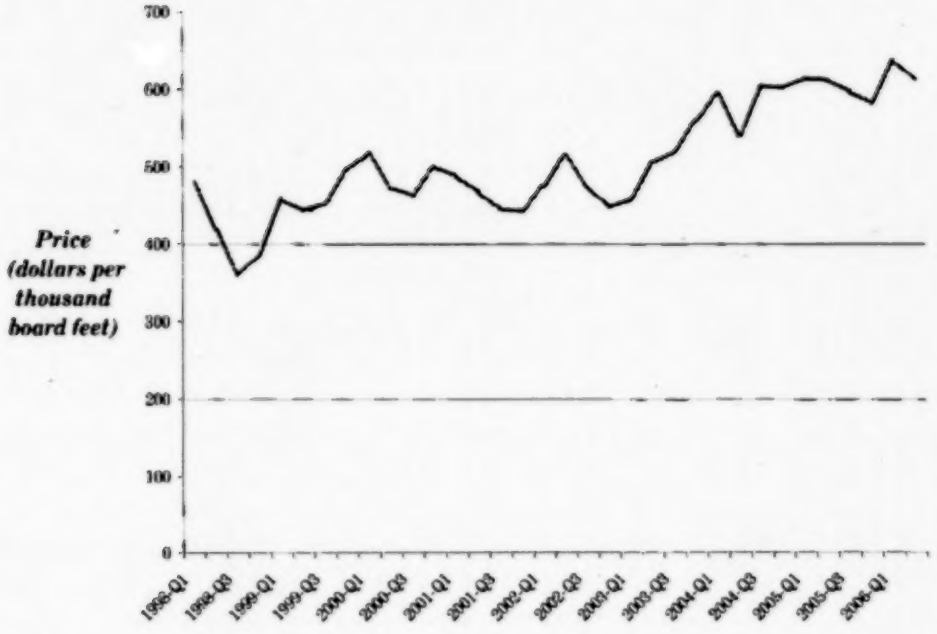
Average June Price of Red Alder (#2) Sawlogs
June 1998 to June 2006
Region 1 Market Area
(Northern Washington, including the Puget Sound area)



Source: Log Lines: Log Price Reporting Service
(July 1998, July 1999, July 2000, July 2001, July 2002, July 2003, July 2004, July 2005, July 2006)

APPENDIX B

Average Quarterly Price of Red Alder (Camprun) Sawlogs 1998 to 2006
Western Oregon



Source: Oregon Department of Forestry Log Price Information for domestically processed logs, delivered to a mill